No. 12,777

IN THE

United States Court of Appeals

For the Ninth Circuit

FENWAL, INCORPORATED
(a corporation),
Appellant,

vs.

W. RAY MONTGOMERY, FREDERICK H. MONTGOMERY, and MONTGOMERY BROTHERS, a partnership,
Appellees.

APPELLEES' PETITION FOR A REHEARING
and
MOTION TO STAY MANDATE.

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable United States Court of Appeals for the Ninth Circuit:

The appellees, W. Ray Montgomery, Frederick H. Montgomery, and Montgomery Brothers, a partnership, respectfully petition for a rehearing in the above entitled cause. The following ground is urged:

1. The findings of the district court that appellees were entitled to an offset of $36,255.20 against the claim of appellant were supported by substantial evidence and were not clearly erroneous, and this court erred in reversing the judgment decreeing such off-

set and ordering judgment for appellant for the full amount of its claim.

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1. THE FINDINGS OF THE DISTRICT COURT THAT APPELLEES WERE ENTITLED TO AN OFFSET OF $36,255.20 AGAINST THE CLAIM OF APPELLANT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND WERE NOT CLEARLY ERRONEOUS, AND THIS COURT ERRED IN REVERSING THE JUDGMENT DECREEING SUCH OFFSET AND ORDERING JUDGMENT FOR APPELLANT FOR THE FULL AMOUNT OF ITS CLAIM.

Three procedural questions call for preliminary comment. The first of these questions involves the contention in appellant's reply brief (p. 7) that "appellees made no claim for recovery in quasi-contract and the court below erred in permitting recovery upon that ground". This court apparently adopted the same view, for it stated at page 2 of its opinion that:

> "The Montgomerys sought no amendment below to the cross complaint changing the issue from one based on the breach of the written contract to one in quasi contract, nor do they seek it in this court."

No amendment of pleadings by appellees was necessary either in the trial court or in this court. Appellees asserted an offset in their answer (T 14) as well as in their cross complaint (T 15-17), and the allegations of the answer respecting offset were broad enough to permit quasi contract relief. Moreover, it is always competent for a trial court to grant quasi contract relief when all the facts are before it and the facts justify that kind of relief. (*Schenley Distillers Corp.*

v. Kinsey Distilling Corp., 3 Cir. 1943, 136 F. 2d 350, 352.) Again, all the facts upon which quasi contract relief could be granted were before the trial court in this case, and they came into the record with the consent of the parties. That in itself would require this court to treat quasi contract relief as if raised by the pleadings. (*Rogers v. Union Pac. R. Co.,* 9 Cir. 1944, 145 F. 2d 119, 123; Rule 15 (b), Federal Rules of Civil Procedure.)

The second procedural question relates to appellate review of evidence. Rule 52 (a) of the Federal Rules of Civil Procedure prescribes:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Recent decisions of the Supreme Court have defined the scope of this Rule. In *United States v. National Assn of Real Estate Bds.,* 339 U.S. 485, 495-496, 70 S.Ct. 711, 717, 94 L.Ed. 1007, it is said:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. (Citations.) We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.' "

And in *United States v. Yellow Cab Co.,* 338 U.S. 338, 341-342, 70 S.Ct. 177, 179, 94 L.Ed. 150, it is said:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the

> credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that which the Government contends. It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even if findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.' "

The decision of this court in *Paramount Pest Control Service v. Brewer,* 9 Cir. 1949, 177 F. 2d 564, is in accord with the rules announced by the Supreme Court in the cases just cited. It is there said by this court, at page 567:

> "A presumption of correctness attaches to the findings of the District Court. *United States v. Foster,* 9 Cir., 1941, 123 F. 2d 32, and under Rule 52 (a), Federal Rules of Civil Procedure, 28

> U.S.C.A., the trial judge's findings of fact will not be set aside unless clearly erroneous. The rule applicable here in the light of the conflicting character of the evidence in the record before us has been aptly stated in *Federal Savings & Loan Ins. Corp. v. First Nat. Bank, Liberty, Mo.,* 8 Cir., 164 F. 2d 929, 932, in this language: 'We are not at liberty to substitute our judgment for for that of the trial court and on appeal that view of the evidence must be taken which is most favorable to the prevailing party, and if, when so viewed, the findings are supported by substantial competent evidence they should be sustained.' "

In a later part of this petition, the appellees undertake the demonstration that the decision in this case is not in accord with the rules thus announced by the Supreme Court.

The final procedural question relates to the scope of the reversal. The trial court was ordered to enter judgment for appellant for the full amount of its claim without opportunity for appellees to supply any deficiency of evidence respecting offset. Appellees urge that at all events they are entitled to that opportunity. They invoke the just rule stated and applied in *Sachs v. Ewing,* D.C. 1943, 133 F. 2d 403, 404-405, as follows:

> "There was no evidence which would have supported a judgment against appellee Ewing on the loans in suit. But if these loans were actually made, as the books showed and as both Samuel and the appellant testified, appellant is entitled to judgment against the corporation. Since that

> evidence was undisputed, and practically identical with the evidence concerning the loans which the court in effect found to have been made, and since the court apparently decided the case on the theory that appellant was bound by the resolution of September 20, we might perhaps take it as established that the loans in suit were made, and direct final judgment for appellant. *But to avoid risk, however slight, or invading the fact-finding function of the trial court, we merely remand the case for further proceedings consistent with this opinion.*" (Emphasis added.)

The effect of the decision of this Honorable Court even deprives appellees of a judgment for the amount of $17,361.46 which was the amount stipulated that the appellees would be entitled to if profit were allowed on all orders accepted prior to the effective date for delivery thereafter less profit on such orders as might have been cancelled by the purchaser. (T. 72 and 73).

The paramount question, of course, is whether this court was in error in concluding in its opinion that there was not enough evidence in the record to support an offset in favor of appellees under the doctrine of quasi contract.

The doctrine of quasi contract is summed up in the working hypothesis that by the ties of natural justice and equity one person shall not unjustly profit through another's loss. It was announced by Lord Mansfield in 1760 in the pioneer case of *Moses v. Macferlan,* 2 Burr. 1005.

In *Schenley Distillers Corp. v. Kinsey Distilling Corp.,* 3 Cir. 1943, 136 F. 2d 350, 352, it is said:

> "Plaintiff was, like any other owner of goods stored without warehouse receipts or in the absence of express contract, bound by contract implied in law or quasi-contract to pay defendant a warehouseman's fair and reasonable charges. *Gay v. Bates,* 99 Mass. 263. * * * Quasi-contractual obligations are imposed or created by law without regard to the assent of the party bound, in order not to permit unjust enrichment. They have been enforced by the courts ever since Lord Mansfield's opinion in the cases of *Moses v. Macferlan,* 2 Burr. 1005 (K.B. 1760.) * * * It has thus become the settled law that a quasi-contract arises where the law enforces a duty upon a person, not because of any express or implied promise on his part to perform it, but even in spite of any intention he might have to the contrary. We said in *Bailis v. R.F.C.,* 3 Cir. 1942, 128 F. 2d 857, 859, that "Unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to do or to forebear doing a particular thing. A quasi-contract does not arise out of a promise. See Restatement, Contracts (1932), sec. 5. In fact it is imposed in direct opposition to the intention of the party charged therewith. Such contracts are the means which the law has adopted to raise up obligations in order to promote justice.' "

In modern terminology the doctrine of quasi contract is usually referred to as the doctrine of unjust enrichment or the doctrine of restitution. Thus in

Restatement, Restitution, section 1, it is said that "A person who has been unjustly enriched at the expense of another is required to make restitution to that other".

The latest work on the subject is Professor Dawson's *Unjust Enrichment,* published in 1951, where it is said:

> "It is broadly true of the modern remedy in the United States that there are no distinctions based on the form or nature of the gain received. Lord Mansfield applied his remarks to the 'common count' for money had and received, which presupposes a transfer or at least a receipt of money. But we have other counts that are almost as common and the same tests apply to them. The benefit may consist of the acquisition or use of chattels, services rendered or acts performed, the use of ideas, or the discharge of an obligation. The list is not yet closed. (p. 22.) * * *
>
> "As to grounds there has been a similar expansion. The main work of quasi-contract has been in the field of express contract, awarding value restitution of performance rendered in actual or supposed conformity with contractual obligations. The modern expansion of grounds for rescission of contract has provided more work to do. (p. 23.) * * *
>
> "The most obvious comment about the American law of restitution is that it lacks any kind of system. This condition is not peculiar to the law of restitution. We generally pride ourselves on our lack of system. When anyone ventures to construct a system, we all set cheerfully to work

to destroy it. The price we pay for this includes among other things, a serious and growing confusion in analysis, a lack of overall intelligibility, and much difficulty in prediction. This price we are paying now in the field called restitution. Confusion is probably inevitable in any large body of doctrine that has grown so rapidly, from so many different directions, by the methods of case law. To this point our gains have also been great; we have been enriched through our own loss. It has been necessary to keep our judges fully exposed to all kinds of new experience, to give them time and opportunity to see their way into the problems. Any impartial critic should freely concede that they have responded remarkably well. Specific solution in restitution cases are still, on the whole, both ingenious and sensible. It is only when one tries to string them together that one becomes confused. The want of system has one general effect, that restitutionary doctrines and remedies are not marked off and confined to any particular class of cases. Some marking off might perhaps be implied from the limited scope of the Restitution Restatement, but the arrangement of the Restatements was for the convenience of the restaters. *Modern restitutionary remedies are chiefly employed for the unwinding of contracts, on all the grounds for which contracts can be unwound.* But they are not confined to contracts, or gifts, or wills, or decedent's estates, or the legal and equitable wrongs. Problems of restitution can arise in any field. Our practice in analysis and cross-citation of cases does not make any one exempt. The remedies ac-

complish different things, their grounds are not quite uniform, but there is nothing in our present conceptions that prevents an appropriate unjust enrichment remedy from being used in any field. (pp. 111-113.) (Emphasis added.) * * *

"However they may be classified, restitutionary remedies deserve a large place in any discussion of our modern law of contracts. *Many contracts, like some people, take on a very different aspect when viewed, not from the front but from the rear.* This is especially true of lopsided contracts, where we are far from a total view. *The particular contribution of restitution remedies is that they raise directly some questions of fairness that standard* contract doctrines disguise. (pp. 114-115.) (Emphasis added.)

"My own conclusion is that restitution remedies in our law have a roving commission. The generalizations now built around them and the techniques they provide have implications that reach in every direction, in unsuspected ways. No area is marked off as exempt. We have not yet absorbed all the contributions they have made or foreseen those still in the making." (p. 117.)

The doctrine is rapidly expanding under the realistic and practical approach to the law by enlightened courts, and in recent years the doctrine has been invoked and applied to achieve substantial justice in cases where, under narrow concepts, justice was denied. (*American LaFrance F. E. Co. v. Borough of Shenandoah,* 3 Cir. 1940, 115 F. 2d 866; *Stanley v. Columbia Broadcasting Co.,* 1949, 35 Cal. 2d 653,

208 P. 2d 9; *Lazzarevich v. Lazzarevich,* 194....., 88 Cal. App. 2d 708, 200 P. 2d 49.)

A reconsideration and appraisal of the evidence in the record will convince this court that the trial court soundly exercised its fact-finding function in allowing the offset in favor of appellees under the doctrine of quasi contract.

The written contract under which appellees bought patented articles manufactured by the appellant in Massachusetts and resold them to customers in western territory (T 5-10) contained the following provision respecting termination of the contract (T 7):

> "This agreement shall continue in force until terminated by either party, but may be terminated by either party upon sixty days' written notice given by the ordinary mail to the last known address of the other party. At the termination of this contract, Montgomery agrees to return to Fenwal all samples, papers, price lists or belongings of Fenwal which may be in the possession of Montgomery at the time and an active list of purchasers of switches."

There was no provision in the written contract specifically charting the course to be followed or regulating the business relations and transaction of the parties in the interval that would elapse between any notice of termination and termination of the contract, or regulating problems that would arise upon or after such termination. The contract provided, however, that during its life the appellees should use their "best efforts" to obtain orders for the patented arti-

cles and pay traveling and other expenses, and that "Montgomery will purchase from Fenwal and at all times carry in stock reasonable quantities of the various types of switches produced by Fenwal in order to be in a position to make prompt shipment of the same to Montgomery's customers". (T 6.)

In the normal functioning of the contract appellees would make a sale of the patented articles to a customer at list prices established by appellant, and appellant would uniformly accept a corresponding order from appellees, ship the articles to the customer, and bill appellees therefor at discount prices stipulated in the written contract. (T 90-91, 206, 209, 211.) There was complete tolerance and cooperation between the parties arising out of rejected material, changes in requirements, changes in technical specifications, delivery dates, and other problems and service attending sales by appellees to the aircraft companies composing their customers. (T 110, 327-329.)

Under date of December 29, 1948, appellant gave appellees notice of termination of the contract as follows (T 96-97):

> "This will notify you that we elect to terminate our agreement with you dated May 26, 1944, as amended by our agreement dated October 11, 1946, this termination to be effective sixty (60) days after the receipt by you of this letter. We believe that it will be possible for you and us to work out the details of the handling of orders which we have received from you either by correspondence or telephone but we shall be

glad to confer with you about this if you feel that it is desirable that we do so."

This was received by appellees on December 31, 1948. (T. 97.) A fair inference from the record is that it was prompted by the fact that appellant contemplated opening a branch office in Los Angeles (T 111) where appellees also maintained a branch office (T 314-315) and where many of their customers were located (T 318-320). In their reply to the letter of December 29, 1948, appellees stated on January 7, 1949 (T 99-100):

> "Third, you are acting within the terms of our Sales Agreement in terminating same as you have elected to do. However, we will expect you to accept all orders that we place with you until the date of termination of the before-mentioned Sales Agreement regardless of the release schedules and the date of actual shipments as called for in our purchase orders. Further, on all our orders now at the factory and all orders placed prior to the termination date, we expect shipments to be made and go forward in accordance with shipping instructions."

Appellant thereupon sent its vice president John M. Storkerson to San Francisco, with plenary authority to work out with appellees "a mutually satisfactory plan for handling the problems which are involved in the termination of our business relationship". (T. 106.) In a letter dated January 20, 1949, and which Storkerson delivered to appellees

at San Francisco on January 24, 1949 (T 107-108), appellant stated (T 105):

> "We note that you expect us to accept all orders that you place with us until the date of termination of the agreement, regardless of the release schedules and dates of shipments, and that you expect shipments to be made on all orders now at the factory and those placed prior to the termination date. That expectation on your part seems to us unfair to Fenwal and not in accordance with our contract with you. We expect to fill orders which have been accepted by us or may later be accepted by us, provided you carry out your part of the contract. It seems likely that the filling of these orders will involve an adjustment of the discount or commission allowed to you, but we shall not try to discuss details in this letter. It is our desire that the termination of our contract should be carried out as smoothly and as pleasantly as is possible to all concerned. We cannot be required to accept orders given to us by you or by anyone else."

In their negotiations with Storkerson at San Francisco on January 24 and 25, 1949, the appellees insisted that in accordance with normal procedure and the normal functioning of the contract they were entitled to full profits on all orders submitted to appellant during the 60-day period regardless of dates of shipment, and that they were able and willing to assume the servicing of such orders. (T 343.) A "mutual satisfactory plan" was worked out at San Francisco, whereby appellees were to receive a new con-

tract or a reinstatement of the old one with the territory of Southern California excluded or deleted, and whereby appellees were to forego 50% of their profits during the 60-day period. (T 343-345.) Pursuant to the "mutually satisfactory plan" one of the appellees accompanied Storkerson to Los Angeles where, on January 27 and 28, 1949, they conferred with the various aircraft companies who were customers of appellees and instructed them to freely place their orders with appellees up to March 1, 1949, and with the factory branch of the appellant in Los Angeles after March 1, 1949. (T 348-349.)

It was the expressed intention of Storkerson at these Los Angeles conferences that appellees should follow the normal procedure during the 60-day period in obtaining orders. (T 216.) Long before such conferences, however, Storkerson's principal, the appellant, had secretly decided that it would not follow normal procedure or the normal functioning of the contract in filling orders obtained by appellees during the 60-day period, but would keep them in abeyance and accept or refuse them as and when it saw fit. (T 216.) The result is obvious. On representations that normal procedure would be followed during the 60-day period, appellant's representative Storkerson induced appellees to obtain orders, to expend time and money, and to commit themselves to their customers at a time when Storkerson's principal, the appellant, had secretly abrogated normal procedure and normal function of the contract and had secretly repu-

diated responsibility for accepting or filling any order thus obtained by appellees. Stripped of all pretense, the position taken by appellant was that during the 60-day period it could hold in abeyance any order obtained by appellees and that appellees would be foreclosed of any claim for profits if it dealt directly with appellees' customers and filled the order after the expiration of the 60-day period.

Given the foregoing situation, a trial judge, seeking to attain justice, would experience no difficulty in finding that neither appellant nor its representative exercised good faith during the working out of a "mutually satisfactory agreement" with appellees. Nor would such trial judge experience difficulty in finding that lack of good faith on the part of appellant and its representative confirmed by later developments.

Between February 7, and 14, 1949, appellees received two proposed contracts from appellant in purported "confirmation of the negotiations between your company, and our Mr. J. M. Storkerson". (T 122.) One had reference to "the basis for handling the mechanics of cancellation". (T 122-124.) The other had reference to the new contract with Southern California territory excluded. (T 127-133.) They were not in accord with the negotiations between Storkerson and appellees and did not conform to the "mutually satisfactory plan" in which the negotiations culminated. In letters dated February 14 and 16, 1949, appellees

pointed out to appellant wherein they should be modified to attain such conformity. (T 134-139, 141-142.)

On February 7, 1949, appellees received from appellant a bill for January invoices. (T 363.) It bore the notation: "Terms 1/10. N/30". This meant 1% discount in 10 days, and net in 30 days, and that interest would be charged after 30 days. (T 147.) The contract between the parties contained no provision as to the time or manner for paying bills. A fair inference from the record is that such provision was omitted from the contract because appellees had established a line of credit with appellant as early, at least, as 1941. (T 120.) In the past, there were times when appellant was heavily indebted to appellees. (T 150-154.) There was a time when appellant did not bill appellees for three months. (T 150-154.) For their own convenience and profit appellees usually paid appellant by the 10th of the month in which a bill was received (T 150-154), but they were not contractually obligated to do so.

Under date of February 21, 1949, appellant inquired concerning payment of the January bill. (T 145.) Appellees replied that they preferred withholding payment until future relations were established as indicated in their letters, that is, according to the "mutually satisfactory plan". (T 172.) Telegrams were exchanged between the parties resulting in a telegram from appellant to appellees on March 2, 1949, stating that all contracts of appellees with appellant had been canceled. (T 174-184.) This was fol-

lowed by a letter dated March 3, 1949, in which appellant listed canceled *and unaccepted* orders. (T. 185-189.) *The unaccepted orders covered all orders that appellees had obtained from their customers during the 60-day period in which deliveries were to be made after expiration of the 60-day period.* (T 302.) This court was in error in its opinion (p. 3) when it said that "on March 3, 1949, Fenwal *cancelled* the undelivered orders". (Emphasis added.) The fact is that appellant never accepted orders that called for delivery after the 60-day period. This, as previously mentioned, was contrary to normal procedure and normal functioning of the contract.

Given the foregoing facts, a trial judge would experience no difficulty in finding that appellant's acts and conduct respecting the unpaid January bill indicated bad faith on its part. He could competently find that when appellant began exhibiting apparent concern over the bill it had all the facts before it showing that the contracts it had proposed did not conform to or confirm the "mutually satisfactory plan" whereunder appellees had obtained orders from their customers during the 60-day period. He could competently find that before appellant began exhibiting that apparent concern it had decided to appropriate the benefits of the orders appellees had obtained from their customers during the 60-day period and to deal directly with such customers after the 60-day period had expired. He could competently find that the apparent concern over the January bill was

designed to accomplish that end. Questions of intent, motive, and design were peculiarly within his fact-finding function to determine. (*United States v. Yellow Cab Co.,* 338 U.S. 338, 341-342, 70 S.Ct. 177, 179, 94 L.Ed. 150.) He could competently find that appellant's letter of March 3, 1949, confirmed appellant's lack of good faith in that it showed that such orders had never been accepted. And he could competently find that appellant's lack of good faith made it impossible for appellees to discharge their contractual obligations to the customers from whom they obtained orders during the 60-day period and inevitably caused the assignment of those orders to appellant on March 9, 1949. (T 67.)

The case was a clear one that appellant, acting in bad faith, had appropriated the benefits to which appellees were entitled under such orders. It was equally clear, under the doctrine of quasi contract or unjust enrichment, that appellant was not entitled to those benefits. There was no doubt as to the amount to which appellees were entitled, for the parties stipulated that "the amount to which defendant and cross-complainant, Montgomery Brothers, would be entitled if profit were allowed on all orders is $36,525.20, less profit on such orders as may be cancelled by the purchaser". The trial judge rendered a sound and just judgment in allowing appellees an offset in that amount against the claim asserted by appellant.

Wherefore your petitioners respectfully pray that the reversal of the judgment herein is a miscarriage

of justice, and a rehearing should be granted and the judgment affirmed.

Dated, San Francisco,
January 21, 1952.

CHARLES A. CHRISTIN,
WALLACE W. SCALES,
Attorneys for Appellees and Petitioners.

CERTIFICATE OF COUNSEL.

The undersigned, one of the counsel for appellees and petitioners in the above entitled cause, hereby certifies in his judgment the foregoing petition for a rehearing is well founded, both in law and fact, and that it is not interposed for delay.

Dated, San Francisco,
January 21, 1952.

CHARLES A. CHRISTIN,
Counsel for Appellees and Petitioners.

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For the Ninth Circuit

FENWAL, INCORPORATED
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W. RAY MONTGOMERY, FREDERICK H. MONTGOMERY, and MONTGOMERY BROTHERS, a partnership,
Appellees.

MOTION TO STAY MANDATE.

To the Honorable United States Court of Appeals for the Ninth Circuit:

The appellees, W. Ray Montgomery, Frederick H. Montgomery, and Montgomery Brothers, a partnership, hereby respectfully move this Court, in the event that their Petition for a Rehearing be denied, for an order staying the issuance of the mandate in said cause for a period of thirty (30) days after denial of said Petition, in order to allow appellees to prepare and file a Petition for Writ of Certiorari in the office

of the Clerk of the Supreme Court of the United States, and thereafter, until such time as the said Petition for Writ of Certiorari may be granted or denied and, if granted, until the final determination of the cause.

Dated, San Francisco,
January 21, 1952.

CHARLES A. CHRISTIN,
WALLACE W. SCALES,
Attorneys for Appellees.